(3)

No. 90-1029

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

EASTMAN KODAK COMPANY,
Petitioner,
v.
IMAGE TECHNICAL SERVICES, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICUS CURIAE* OF THE COMPUTER AND BUSINESS EQUIPMENT MANUFACTURERS ASSOCIATION IN SUPPORT OF PETITIONER

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MOTION OF THE COMPUTER AND BUSINESS EQUIPMENT MANUFACTURERS ASSOCIATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Computer and Business Equipment Manufacturers Association ("CBEMA") hereby moves, pursuant to Rule 37.2 of the Rules of the Court, for leave to file the attached brief as *amicus curiae* in support of the petition of Eastman Kodak Company ("Kodak") for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Kodak has consented to the filing of the brief; respondents have withheld their consent.

CBEMA is a leading trade association representing 26 major manufacturers of computer and business equipment systems and associated maintenance and repair services, replacement parts, supplies, and training. The misapplication of market power analysis by the court of

appeals below, and its erroneous conclusions regarding Kodak's business conduct, threaten to provoke a surge of new treble damages actions against CBEMA members, challenging many commonplace marketing and distribution practices that enhance competition in this industry and promote product and service quality.

The attached brief brings relevant matter to the attention of the Court that has not already been brought to the Court's attention. Accordingly, the motion to file the attached brief should be granted.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE COMPUTER AND BUSINESS EQUIPMENT MANUFACTURERS ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The Computer and Business Equipment Manufacturers Association ("CBEMA") is a leading trade association representing 26 major manufacturers [1] of computer hardware and software, peripherals, telecommunications equip-

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[1] CBEMA's members include: 3M; AMP Inc.; Amdahl Corp.; Apple Computer, Inc.; AT&T; Bell & Howell; Bull HN Information Systems, Inc.; Compaq Computer Corp.; Dictaphone Corp.; Digital Equipment Corp.; Eastman Kodak Co.; Fujitsu America, Inc.; Hewlett-Packard Co.; Hitachi Computer Products (America), Inc.; Honeywell Keyboard Division; IBM Corp.; ICL, Inc.; Information Handling Services; Multigraphics, A Division of AM International Inc.; NCR Corp.; Panasonic Communications & Systems Co.; Sony Corp. of America; Tandem Computers Inc.; Tektronics, Inc.; Texas Instruments Inc.; and Xerox Corp.

ment, photocopiers, micrographic equipment and other business equipment.[2] Some of CBEMA's members also make other technologically advanced equipment, such as medical equipment used in health care facilities. To enhance their sales of hardware and software, CBEMA members also offer hardware and software maintenance and repair services, replacement parts, supplies, training and other associated services and products.

CBEMA is submitting this brief *amicus curiae* because the Ninth Circuit's approach to market power analysis in this case threatens to provoke a surge of new treble damage actions against CBEMA members, challenging broad classes of commonplace marketing and distribution policies that are designed to enhance competition and promote product and service quality, product innovation, safety, and other ends beneficial to consumers.

If the Ninth Circuit's decision is allowed to stand, manufacturers of computer systems and a whole range of other technologically advanced products in competitive industries may be held to have "market power" in the "markets" for their *own branded products*, components, replacement parts, and associated services, *even if* these manufacturers have *no* market power in the interbrand markets for the systems themselves. As a result of the Ninth Circuit's radical approach, lawsuits will spring up to challenge the continued use of "authorized dealer" criteria to assure quality control and customer satisfaction in the sale of technologically complex products, and plaintiffs will challenge a whole variety of busi-

[2] CBEMA represents a multifaceted high-technology industry that is critical to the U.S. economy. CBEMA members had total revenues of $180 billion in 1989 from information technology and services. The computer and business equipment industry had $26 billion in exports in 1988, fully eight percent of total U.S. exports. CBEMA members employ over 1.2 million workers in the U.S.

ness practices that are designed to strengthen warranty programs and extended service arrangements, protect intellectual property, and promote product safety. Manufacturers will be inhibited from continuing to develop authorized dealer networks if they can be challenged as instruments to "monopolize" the sale of branded products, or if literally anyone can demand the right to purchase a manufacturer's products for resale. And manufacturers cannot be expected to offer extended warranties on complex systems if they cannot require customers to use approved sources of parts and service or impose other restrictions. These and similar product marketing and distribution practices are vital components in individual manufacturers' efforts to win customers' loyalty and compete in interbrand markets.

Inexorably, the rash of litigation spawned by failure to reject this new approach to market power analysis will lead to a detailed program—comprehensive in scope but fragmented in execution—for regulating how systems manufacturers in competitive industries go about distributing and promoting their products. Because this program will be implemented by the courts through private actions alleging "tying" and "monopolization" by manufacturers, backed by the blunt instruments of *per se* liability and treble damage exposure, manufacturers will be deterred from adopting policies that involve even a slight risk of challenge. The resulting *de facto* regulatory regime will be especially rigid and averse to innovation.

Throughout the 1980s, CBEMA has provided the courts,[3] Congress and a number of state legislatures with views

[3] CBEMA was one of a number of organizations sponsoring a brief *amicus curiae* in *Boat & Motor Mart v. Sea Ray Boats, Inc.*, 825 F.2d 1285 (9th Cir. 1987), urging the Court of Appeals to construe California franchise law narrowly to avoid imposing its elaborate restrictions on diverse independent dealer relationships that bear no relationship to franchises.

on a variety of proposals that would have impaired interbrand competition by regulating independent dealer relationships as if they were franchises, and proposals that in other ways would have limited the ability of systems manufacturers to respond appropriately when independent dealers were not performing under their contracts. Most recently, CBEMA provided testimony before the House and Senate Judiciary Committees [4] in the 101st Congress opposing legislation that would have overruled this Court's *Monsanto* and *Sharp* decisions [5] and placed inappropriate burdens on manufacturer-defendants to disprove weakly supported *per se* resale price maintenance claims by dissatisfied dealers and distributors.

Interbrand competition among CBEMA members and other systems manufacturers drives technological innovation, lowers prices and improves service to customers. Court review of the Ninth Circuit's decision is critical to ensure that the antitrust laws are used to enhance, not hinder, valuable interbrand competition in this industry.

SUMMARY OF ARGUMENT

The Ninth Circuit's holding in this case is insupportable. Because it is undisputed that Kodak lacks market power in the interbrand market for photocopiers and micrographic equipment, it cannot have market power in any derivative "market" for component parts, replacement parts, or service for its branded equipment. The Ninth Circuit's decision would make every manufacturer a monopolist, and threatens to impair, not enhance, vital inter-

[4] *Price Fixing Prevention Act of 1989: Hearing on H.R. 1236 Before the Subcomm. on Economic and Commercial Law of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 255 (1989) (statement of Simon Lazarus on behalf of CBEMA); *To Amend the Sherman Act Regarding Retail Competition: Hearing on S. 865 Before the Senate Comm. on the Judiciary*, 101st Cong., 1st Sess. 374 (1989).

[5] *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984); *Business Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717 (1988).

brand competition. The decision would interfere with the ability of systems manufacturers to design, sell and service such systems and meet customer demand, and would create an unmanageable "duty to deal" with unauthorized service suppliers.

Although the facts of this case involve replacement parts for photocopiers and micrographics equipment, the impact of the Ninth Circuit's decision will be much broader. The appellate court's approach to market power analysis will affect competition not only in the photocopier and micrographics equipment markets, but also in the markets for computers and associated equipment and software, business equipment generally, high-technology medical and scientific equipment, and virtually every other complex product sold as part of an integrated system in a competitive interbrand market. Moreover, the impact of the decision will not be limited to parts policies, but will more generally affect the design of distribution and marketing arrangements for those systems, warranties, service agreements, and other business policies and practices, and even the way different hardware and software products are integrated into systems. Manufacturers' decisions in all of these areas are vital parts of their strategies for competing with industry rivals.

The adverse impact of the Ninth Circuit's decision looms particularly large because it virtually eliminates summary judgment in a large class to tying and monopolization cases in which private plaintiffs merely assert without proof that unspecified "market imperfections" may cause market power to exist in circumstances in which the existence of such market power is economically implausible. The court's holding was plainly contrary to this Court's holding in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), that plaintiffs must offer "more persuasive evidence" to survive summary judgment in such situations.

The market for computer and business equipment systems is vibrant, technologically innovative, and intensely

competitive. It is particularly inappropriate in this setting to use *per se* liability rules to invalidate marketing and distribution practices that foster interbrand competition on the grounds that they are illegal "tying" arrangements that limit intrabrand competition. The Court should grant Kodak's petition for writ of certiorari to forestall these aberrant results, bring the Ninth Circuit's decision into line with established precedent and provide needed guidance to numerous lower courts now considering similar cases.[6]

ARGUMENT

The plaintiffs in this case, a number of independent service organizations ("ISOs") that were not part of any Kodak-authorized dealer network, challenged Kodak's policies not to sell replacement parts for Kodak photocopiers and micrographic equipment to ISOs or their customers.

The primary reasons for Kodak's policies were to maintain the highest possible standards for the servicing of its equipment, and to avoid divided responsibility for equipment performance that could lead to "finger pointing" and customer dissatisfaction when unauthorized ISOs could not repair a particular problem. These policies were designed to permit Kodak to win its customers' respect and loyalty, expand its share of the interbrand market, and better compete with such substantial companies as Xerox, Savin, Canon, Ricoh, 3M, Bell & Howell, and Minolta.

Nevertheless, the ISOs, seeking expanded access to the service market, claimed that these policies amounted to unlawful tying and refusals to deal under Sections 1 and 2 of the Sherman Act. U.S. District Court Judge William Schwarzer granted Kodak's motion for summary judgment on these claims, but a divided panel of the Ninth Circuit reversed.

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[6] As noted in the Petition, there are a dozen other pending cases involving identical issues in the computer, medical equipment and printing equipment industries. Pet. App. at 42E-43E.

On appeal, the majority of the court focused on the ISOs' claims that Kodak had tied the sale of service to the sale of its replacement parts, and that it used its replacement parts policies to monopolize the "market" for service of Kodak brand equipment. These claims require a showing that Kodak has market power in the alleged "market" for its replacement parts, and that the service of Kodak brand equipment is indeed a "market" over which Kodak could obtain market power.

On the tying claim, however, the ISOs did not dispute that Kodak lacked market power in the interbrand market for copiers and micrographic equipment, and the Ninth Circuit recognized the "logical appeal" in Kodak's argument that it could not have market power in the market for Kodak replacement parts if it lacked market power in the interbrand market. Pet. App. at 8A n.3, 19A. Nevertheless, the majority held that there was a triable issue whether Kodak has market power over the alleged tying product because *unspecified* "market imperfections" could create market power in this setting.

The majority also reversed Judge Schwarzer's grant of summary judgment on the respondents' Section 2 monopolization claims, holding, based on a similarly speculative line of reasoning, that Kodak could have monopoly power in a distinct market for service of Kodak equipment. The Ninth Circuit thus remanded for a trial on the ISOs' admittedly implausible claims.

I. THERE IS INTENSE COMPETITION IN THE INTERBRAND MARKET FOR COMPUTER AND BUSINESS SYSTEMS.

The interbrand markets for the computer and business systems manufactured and sold by CBEMA members and other domestic and foreign companies are characterized by increasing international competition and by sophisticated and demanding customers who are seeking integrated solutions to specific information processing problems.

There are hundreds of participants in the computer and business equipment markets.[7] The participants in these markets include many of the Nation's largest businesses, such as IBM, AT&T, DEC, Hewlett-Packard, Apple, Kodak and Xerox, as well as major foreign manufacturers such as Hitachi, Fujitsu and Sony. In addition, many smaller companies also compete for this business.

These markets are characterized by extraordinary technological innovation, compressed product-cycles, continued downward pressure on prices, and widely varied and continuously changing patterns of packaging, distributing, and servicing products. Competition from international as well as U.S.-based manufacturers is intense, and new entries into and exits from particular markets are frequent. The rewards for successful product development and distribution strategies can be great, though often temporary, while the penalty for mistakes or slow responses to market trends is severe and, not infrequently, enduring. All these features of contemporary high technology information technology markets make it particularly imperative for manufacturers to enforce strict standards on the manner in which their products are marketed and serviced.

The degree of competition in these markets is perhaps best demonstrated by the trend of falling product prices. The price index for microprocessors, for example, declined by over 22 percent in the 1980s, while the consumer price index increased almost 36 percent during the same period. The price of general purpose digital computers fell 9.2 percent between 1988 and 1989.

Purchasers of high technology computer and business systems tend to be both sophisticated and demanding. Customers seek solutions to specific information processing problems. In selecting systems to meet those specific

[7] For example, over 400 companies are listed under the Standard Industrial Classification for computer manufacturers.

needs, customers consider and compare total system costs, which include both the initial purchase price and the costs of associated products, replacement parts, service, and maintenance.[8] Competition in the interbrand markets for computer and business equipment includes competition on the value and terms of various post-sale services.[9] A company's failure to innovate and compete with regard to these post-sale services will quickly result in loss of business at the interbrand level.[10]

In response to the great diversity in customer preferences and customers' solution-seeking approach, manufacturers offer an enormous number and range of products, and combine products into systems and packages designed to meet customer needs. For instance, monitors, computer processing units, operating system and applications software, disk drives, keyboards and printers are often sold as integrated systems. Warranties are packaged with hardware or software for customers who do not want to worry about post-sale problems. Training, manuals and other user-assistance services are sold with hardware and software to address customer desires for education and information about using their business and computer systems. Manufacturers offer a vast number of different product combinations, driven by customer demand, competitive pressure, and engineering creativity.

[8] For instance, respondents did not dispute that purchasers of Kodak equipment consider the costs of parts and services when deciding between Kodak's products and other manufacturers' products. Pet. App. at 8A.

[9] *See Continental T.V. Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 55 (the quality of service and repairs affects the competitiveness of a manufacturer's products).

[10] *E.g., General Business Sys. v. North Am. Philips Corp.*, 699 F.2d 965, 972-73 (9th Cir. 1983) (manufacturer's decision to continue using outdated computer card technology in the face of new computer disk technology resulted in loss of market share in the computer systems market).

II. MAINTAINING SERVICE QUALITY IS CRITICAL TO ENHANCING INTERBRAND COMPETITION.

Because computer and business systems are technologically sophisticated products, quality assurance at every stage of the manufacturing, distribution, sales, and post-sale service process is critical to maintaining customer satisfaction.

Any given problem with computer or business system performance can be caused by problems with the hardware, software, the hardware maintenance program or replacement parts, or software maintenance or updates. Indeed, the customer often cannot identify the source of a given problem—all he or she knows is that the system as a whole is not performing the task that he or she purchased the system to perform.

Any bad experience with a system, regardless of the cause, tends to reflect badly on the reputation of the manufacturer. In particular, if the responsibility for system repair and maintenance is divided among multiple companies, it is difficult or impossible for the customer to know which provider may be responsible for a problem. Customers tend to attribute the blame for any problems to the manufacturer and shift their loyalty to systems supplied by competitors.

To maintain quality standards, and minimize the "finger pointing" problem, information systems providers have experimented with a diverse range of business practices, such as using authorized dealers to provide expert point-of-sale and post-sale services and providing product warranties and extended service agreements. For a manufacturer to assure customer satisfaction, and to compete against its rivals, it must have flexibility to implement these or similar policies in delivering its products and services—and the flexibility to modify its approach as competitive conditions change.

III. THE NINTH CIRCUIT'S DECISION THREATENS PROCOMPETITIVE DISTRIBUTION AND MARKETING PRACTICES.

The unjustified "micro-market" analysis of market power by two judges of the Ninth Circuit jeopardizes the ability of manufacturers to implement a variety of procompetitive quality assurance policies for complex computer, business and other high technology systems. Most obviously, the decision below invites private treble damages suits challenging replacement parts policies comparable to Kodak's. This result will strongly discourage business equipment manufacturers from implementing business practices designed to reduce "finger pointing," assure quality service, and manage inventory costs, even though such practices enhance competition and have no demonstrated adverse effect on consumers.

More generally, the decision below threatens a whole range of similar point-of-sale and post-sale policies designed to maintain the quality and integrity of sophisticated systems. If permitted to stand, the Ninth Circuit's decision would dramatically limit manufacturers' flexibility to determine the best means to deliver hardware and software products, product updates, warranties, parts, maintenance, repair services, and other post-sale services throughout the computer and business equipment markets and in other markets in which quality assurance is critical to customer satisfaction, such as medical and scientific equipment.[11]

Authorized Dealer Networks. Many system manufacturers distribute their products and services through a network of qualified dealers. In order to qualify, a dealer must have the training and technical expertise to advise

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[11] *See, e.g., Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256 (5th Cir. 1978) (involving parts for centrifuge equipment used for biomedical analysis and vaccine development). *See also Mozart Co. v. Mercedes Benz of N. Am. Inc.*, 833 F.2d 1342 (9th Cir. 1987) (involving parts for luxury automobiles).

customers on how to use and combine the manufacturer's products into a system that will meet the customer's needs. The dealer also must have the skills and facilities to provide warranty and other post-sale service. Authorized dealers are provided with a full line of hardware and software products, parts and updates.

Authorized dealers are an important option for the delivery of products and services, permitting a manufacturer to ensure quality control at the retail level. Knowledgeable advice from the dealer at the point of sale will permit the customer to select the most appropriate system, and thereby promote customer satisfaction with the products. Moreover, providing advice and expertise, sales, training and post-sale maintenance and repair through a single, full-service outlet provides the customer with better and more convenient service. Using authorized dealers is an important means of enhancing the customer reputation of the manufacturer's products.

Under the open-ended "duty to deal" which arises from the Ninth Circuit's analysis, however, a manufacturer might be precluded from limiting product or parts distribution to authorized dealers—anyone could assert the right to become a reseller of the manufacturer's products. In spite of intense competition in the interbrand market, a plaintiff could assert, based on the decision below, that the manufacturer has market power in some brand-specific submarket, such as parts or software. The continued use of authorized dealer networks, which serve consumer interests and promote interbrand competition, would be threatened.

Warranty Programs. Warranties for computer and business systems benefit customers by directly shifting the risk associated with malfunctions or other system problems from the purchaser to the manufacturer. Warranties are an important factor in interbrand competition, as can be seen most clearly in advertising for computers and other high-technology products. Indeed, as a

promotional device, one manufacturer in the industry has guaranteed *replacement* of its equipment at the option of the customer over a three-year period.

In order to limit the manufacturer's exposure under such guarantees or extended warranties, conditions on the maintenance and repair of the warranted product are often included. For instance, warranty coverage is often conditioned on the service being performed by the manufacturer, the use of designated, trained service organizations for any necessary repairs or maintenance, or the use of manufacturer-approved replacement parts.[12] These conditions ensure that the manufacturer is only guaranteeing its own performance—and that it is not responsible for the errors of others.

The Ninth Circuit's market power analysis could severely discourage manufacturers from offering such warranties. Unauthorized service organizations might argue that market power in the "market" for brand-specific extended warranties or service arrangements is the basis for tying and attempted monopolization claims relating to the parts or service markets. With the threat of this type of claim, manufacturers may be forced to offer less comprehensive warranties, or to permit unauthorized service organizations to share responsibility for servicing warranted products, to the detriment of consumers and competition in the interbrand market.

Selling Systems. It is common for computer and business equipment manufacturers to combine complementary components and services into integrated systems for sale to customers who desire them. For instance, software may be sold with a maintenance contract providing for the delivery and installation of software upgrades by authorized service representatives as they are developed.

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[12] *See, e.g., Spectrofuge, supra,* at 262-63 (warranty provides one price for replacement parts for centrifuges if the manufacturer provides service, and a higher price if an ISO provides service).

This maximizes customer satisfaction by ensuring that all users have the best software product operating in their systems. It also facilitates servicing the system, because a repairman visiting the customer's facilities knows that all necessary updates have been installed when her or she is testing the system.

These procompetitive arrangements could be subject to challenge under the Ninth Circuit's decision. In the software upgrade example, unauthorized service organizations could claim that the manufacturer has market power in the "market" for the branded software, and is using that power to tie or attempt to monopolize software maintenance services. Facing the prospect of defending jury trials, manufacturers could be reluctant to use such arrangements, although these arrangements foster ongoing product innovation and improvements which benefit consumers.

Diagnostic Software. Some computer companies have developed specialized, highly sophisticated computer programs designed to isolate problems, or "bugs," in their computer systems. This diagnostic software is developed, at substantial cost, to allow manufacturers to identify and solve customer problems more quickly, efficiently and effectively. In some cases, the software can be installed in the customer's equipment and then accessed by the manufacturer's service personnel from their central service headquarters by modem and telephone link.

Computer system customers consider the cost and quality of maintenance and repair services when they choose from among systems offered in the interbrand market. Diagnostic software, which permits the manufacturer to offer better service, is developed to respond to customer demand and to compete in the interbrand computer system market.

A manufacturer may legitimately impose limitations on how its diagnostic software can be used: (1) to protect its significant investment in the software; (2) to

preserve its copyright; (3) to safeguard trade secrets; (4) to ensure that the software is used properly; and (5) to assure that any bugs that are identified are remedied. For example, in *Service & Training, Inc. v. Data General Corp.*, 737 F. Supp. 334 (D. Md. 1990), the manufacturer allowed installation of the diagnostic software in a customer's computer only if the customer maintained a service agreement with the manufacturer. The agreement specified that the program remained the property of the manufacturer, and would be removed if the service contract were cancelled. The manufacturer also licensed the diagnostic software to large customers that serviced their own equipment, with an agreement strictly limiting the use of the software to the equipment for which it was provided.

The market power analysis endorsed by the Ninth Circuit in this case could be used to argue that the antitrust laws require a manufacturer to provide its diagnostic software to a customer even if the customer chooses to purchase follow-up service from an unauthorized ISQ, and/or require manufacturers to license unauthorized ISOs to use the software themselves. By claiming that the manufacturer has market power in the "market" for diagnostic software for its branded products, unauthorized service organizations could claim both tying between the diagnostic software and service, and attempted monopolization of the service market. Under the Ninth Circuit's analysis, plaintiffs could survive summary judgment with little evidence of market power beyond this speculative assertion. Faced with the prospect of treble damages claims, manufacturers might decide not to develop the software in the first place, or not to permit authorized dealers or large direct customers to use the software or install it in their systems. Such a result would injure both the quality of service available to the customer and the ability of the manufacturer to compete in the interbrand market.

Safety Concerns. For some products, such as medical equipment, parts and service practices are dictated by safety concerns.[13] Inadequate service of some equipment can cause serious injury.[14] A medical equipment manufacturer [15] may adopt business policies—such as selling medical equipment with a service agreement, providing warranties conditioned on use of the manufacturer's replacement parts and service, or providing replacement parts only to certified dealers and service providers—to ensure proper maintenance of its products. These policies clearly promote the patient's health and safety. Correspondingly, careful maintenance is also in the interest of both the health care provider and the manufacturer, minimizing the risk of tort liability relating to the failure of the equipment.

Despite their clear benefit, such practices could be subject to attack under the Ninth Circuit's analysis, subjecting the aftermarket for medical equipment parts and services to massive disruption. This result is contrary to the public interest, chilling practices designed to ensure that medical equipment is maintained in optimal condition.

IV. THE NINTH CIRCUIT'S DECISION THREATENS TO FORCE INTEGRATED FIRMS TO SUBSIDIZE NON-INTEGRATED COMPETITORS.

The necessary effect of the Ninth Circuit's decision will be to impose new duties to deal for manufacturers struggling to compete in interbrand markets. This new-

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[13] *See Continental T.V., supra,* at 55 n.23 (safety concerns are a legitimate reason for vertical restrictions concerning product marketing and service).

[14] *Spectrofuge, supra,* at 258 n.1 (improper servicing of centrifuge equipment used for biomedical analysis and vaccine preparation can result in explosion or contamination by hazardous materials).

[15] Several CBEMA members manufacture medical equipment in addition to computer and business equipment.

found, open-ended duty to deal could be extremely onerous, particularly for the smaller or weaker participants in these markets.

As just one example, some manufacturers of high technology computer or business systems must produce and stock hundreds of thousands of replacement parts at very substantial costs. Typically, to minimize the costs of maintaining these inventories, manufacturers stock only the parts necessary to guarantee service to direct equipment purchasers and authorized dealers. Under the Ninth Circuit's decision, in a regime in which anyone can demand equal access to any number of parts, manufacturers will be forced to maintain larger inventories, at even greater costs. In effect, by incurring these greater costs, manufacturers would be forced to subsidize their downstream service competitors. The antitrust laws have never before been stretched to encompass such a purpose when interbrand markets are competitive.

V. THE DECISION BELOW THREATENS AN ANTICOMPETITIVE EXPANSION OF *PER SE* LIABILITY.

Use of *per se* liability rules to invalidate the business practices discussed above would be particularly inappropriate in this vibrant, competitive industry. *Per se* liability (and treble damages) would flow automatically in a tying case from a finding by a trier of fact—permissible under the Ninth Circuit's holding—that a particular systems manufacturer had the requisite market power in an intrabrand product or service.

Per se liability rules, such as the rule for tying, were created to conserve judicial resources in cases involving restraints that are "plainly anticompetitive" and cannot be justified in competitive terms. *Broadcast Music Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 8 (1979). The Court has held that, to be manifestly anticompetitive, agreements or practices must have a "per-

nicious effect on competition and lack . . . any redeeming virtue." *Northern Pacific Ry. v. United States*, 356 U.S. 1, 5 (1958).

No characterization could be more inapt, in regard to the high technology markets affected by the Ninth Circuit's decision. As discussed above, the market for computer and business equipment systems is intensely competitive, and the restraints at issue in this case promote interbrand competition. This is precisely the kind of circumstance in which the Court has refused to extend the *per se* rule. *Continental T.V. Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 52 n.19 (1977) ("interbrand competition . . . provides a significant check on the exploitation of intrabrand market power").

As a result, the Court should limit the application of *per se* tying analysis to cases in which there is clear evidence of significant market power in the tying product market, as it did in the *Jefferson Parish* case. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 13-14 (1984). The Court should be especially reluctant to apply the *per se* rule where, as in this case, vigorous interbrand competition eliminates the possibility of market power in any "aftermarket."

VI. THE DECISION BELOW MISAPPLIED THIS COURT'S SUMMARY JUDGMENT RULES.

This Court has held that when a plaintiff makes claims that are inconsistent with traditional notions of economic and antitrust analysis, it must present "more persuasive evidence than would otherwise be necessary" to support its theory in order to survive a motion for summary judgment. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). An antitrust plaintiff is not entitled to a trial on the merits on the basis of an implausible theory supported by ambiguous evidence.

The Ninth Circuit acknowledged that respondents' assertion that Kodak had market power in the market for

Kodak parts was inconsistent with economic theory, because Kodak's desire to attract customers in the interbrand equipment market would keep it from charging higher than competitive prices for service.[16] Pet. App. at 9A. The court noted that "appellants do not dispute that equipment purchasers consider the cost of parts and service when initially deciding between Kodak's equipment and competitors' equipment." Pet. App. at 8A. Nonetheless, the Ninth Circuit dismissed the price discipline of the interbrand market as "theoretical." Pet. App. at 10A.

In the face of this economically rational explanation of why Kodak possessed no market power in the market for Kodak replacement parts, the court did not require the respondents to identify any particular "market imperfections" that would keep the market from functioning as economic theory would predict. Instead, the Ninth Circuit held that "[i]t is enough that appellants have presented evidence of actual events from which a reasonable trier of fact could conclude that . . . competition in the interbrand market does not, in reality, curb Kodak's power in the parts market." Pet. App. at 10A.

The evidence found to be sufficient to survive summary judgment on the issue of market power consisted of (1) evidence that Kodak's service charges were higher than those charged by ISOs for lower quality service; and (2) evidence that competition from ISOs sometimes caused Kodak to lower its price for service. Pet. App. at 10A-11A. In practice, anecdotal evidence of such general factors can almost always be found. If such minimal

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[16] The Ninth Circuit's aftermarket analysis leads to a counter-intuitive result. The court concedes that a manufacturer could tie both replacement parts and service to the copier system if it did not have market power in the interbrand market for copier systems. Pet. App. at 8A-9A. However, the court held that a *less* restrictive arrangement, an alleged tie of service to parts without any tie to equipment, is subject to antitrust challenge.

evidence is sufficient to establish a disputed issue of fact on the existence of market power in an aftermarket, in spite of the absence of market power in the interbrand market and the customers' consideration of parts and service costs in making interbrand decisions, then summary judgment virtually never will be granted. The evidence relied upon by the Ninth Circuit plainly falls far short of the "more persuasive evidence" test established by this Court in *Matsushita*, threatening an explosion of burdensome jury trials against manufacturers in competitive industries.

CONCLUSION

For the foregoing reasons, Kodak's petition for writ of certiorari should be granted.

Respectfully submitted,

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